Supreme Court, U.S.
FILED

NO. 11560 APR 16 2002

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In The

Supreme Court of the United States

PABLO E. BARRIOS,

Petitioner,

vs.

THE FLORIDA BOARD OF REGENTS and JESSIE L. CAMPBELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Whether a reassignment to a different job involving different hours and conditions of employment is legally sufficient to constitute an adverse employment action, although that transfer does not result in a monetary penalty to the employee, in order to permit that employee to have his claim of retaliation pursuant to 42 U.S.C. § 2000e-3 heard by a jury?

Question Two: Whether a reassignment to a different job involving different hours and conditions of employment is legally sufficient to constitute an adverse employment action, although that transfer does not result in a monetary penalty to the employee, in order to permit that employee to have his First Amendment claim pursuant to 42 U.S.C. § 1983 heard by a jury?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Pablo E. Barrios, petitions this Court to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the lower appellate court is unpublished. That opinion is reproduced in the appendix to this petition at Appendix (hereafter App.) 1.

BASIS FOR JURISDICTION

The opinion of the lower court was filed on January 16, 2002.

This Court has jurisdiction to review the decision of a lower federal appellate court pursuant to Title 28 United States Code section 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

Title 42 United States Code section 2000e-2(a) provides:

> (a) **Employer practices.** It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title 42 United States Code section 2000e-3(a) provides:

(a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Title 42 United States Code section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,. . . .
* * *

STATEMENT OF THE CASE

The petitioner, Pablo Barrios, filed an amended complaint raising several causes of action. That complaint demanded a jury trial. Plaintiff-petitioner Barrios sued two defendants. The first defendant is the Florida Board of Regents, the governing body for Florida International University (hereafter F.I.U.) – a school of the State of Florida. The second defendant, who was sued in his individual capacity, is Jesse L. Campbell. Mr. Campbell was the Director of Public Safety at the campus of Florida International University. Petitioner Barrios worked as a law enforcement officer at F.I.U. for twenty (20) years at the time that his complaint was filed. At the time of the filing of this complaint, petitioner Barrios was a lieutenant, who worked for defendant Florida Board of Regents and under the direction of defendant Campbell.

One count of the amended complaint was dismissed upon motion. All remaining counts were disposed of at the trial level by the granting of a motion for a summary judgment.

On appeal, petitioner Barrios only challenged the granting of a summary judgment on two claims. The petitioner asserted that the trial court erred in finding that petitioner Barrios was not entitled to a jury trial on

his statutory claim predicated on Title 42 United States Code section 2000e-3 – referred to as Title VII litigation[1] – that he had been the victim of illegal retaliation resulting from the fact that petitioner Barrios had previously asserted a claim of discrimination with the appropriate authorities. This claim was asserted only against his employer, defendant Florida Board of Regents. The petitioner also maintained that the trial court erred in finding that petitioner Barrios was not entitled to a jury trial on his statutory claim predicated on Title 42 United States Code section 1983 that he had been deprived of his First Amendment right to freedom of speech, as guaranteed to him under the Constitution of the United States. This second claim was directed only against defendant Campbell in his individual capacity.

The trial court disposed of these two claims on the defendants' motion for a summary judgment. The district court judge ruled that petitioner Barrios failed to present legally sufficient evidence that he, petitioner Barrios, suffered an adverse employment action as a result of the conduct of the two defendants. Ruling that the element of an adverse employment action was common to both of those counts in the complaint, App. 9, 15-16[2], the trial judge granted summary judgment, because petitioner Barrios' evidentiary showing on this element was legally

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[1] This statute is contained in Section 704 of Title VII of the Civil Rights Act of 1964.

[2] The trial judge relied on *Merriweather v. Alabama Dept. of Pub. Safety*, 17 F. Supp. 2d 1260 at 1279 (M.D. Ala. 1998), *aff'd*, 199 F.3d 443 (11th Cir. 1999) to apply the element of an adverse employment action to a First Amendment retaliation claim.

insufficient.[3] The trial judge established the elements needed to be proved by petitioner Barrios by relying on *Gupta v. Florida Bd. of Regents*, 212 F.3d 571 at 587 (11th Cir. 2000), and then utilized the analysis contained in the Eleventh Circuit's controlling decision *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232 (11th Cir. 2001) regarding the issue of what constitutes a litigable adverse employment action. App. 10-11, 12-14, 15-16. Like this case, *Davis, supra*, involved a Title VII claim by a police officer.

In the procedural context that brings this case to this Court, the factual showing, which petitioner Barrios made to establish that he suffered an adverse employment action, is indisputable.[4] In his declaration,

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[3] The trial judge asserted several strawman arguments that petitioner Barrios did not make in his response to the motion for a summary judgment regarding the issue of the sufficiency of the evidence to establish an adverse employment action. For present purposes, the trial court's discussion of its own self-generated arguments will be ignored at this time.

The district court did not find that petitioner Barrios made an insufficient showing on the element that he had been engaged in protected activity. That lowest court did not address the third stated element of this cause of action, namely whether there was sufficient evidence of a causal relationship between the protected activity and the adverse employment action, because that judge's ruling regarding the deficiency of proof on the element of an adverse employment action made the third required showing a moot issue.

[4] The defendants did not take issue with the facts contained in this declaration. Had they done so, summary judgment would have been denied on the basis that a genuine issue of material fact existed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242

petitioner Barrios stated: "I, Pablo Barrios, was in the investigations unit of the F.I.U. Police Department for more than ten years. That unit worked most of the time from 9:00 a.m. to 5:00 p.m. Persons in that unit had Saturdays and Sundays off, unless a special investigation was being conducted. Officers who work in the investigations unit work out of an office, rather than a car, and wear plain clothes. Officers in the investigations unit get more money for their clothing allowance. Officers who work in the investigations unit [ ] have as part of their job responsibility working, for example, to protect visiting dignitaries. Patrol officers deal with commoners. While in the investigations unit, I, Pablo Barrios, always had good evaluations for this work performance. * * *

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at 250 (1986). For this reason, the petition truly presents a pure question of law for this Court to resolve.

As a matter of law, the factual declaration of petitioner Barrios seeking to establish an adverse employment action must be believed and viewed in a light most favorable to the position of petitioner Barrios on the issue of whether petitioner Barrios suffered an adverse employment action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 255 (1986).

Moreover, because of the trial court's legal ruling regarding the legal insufficiency of proof of the element of an adverse employment action, all other facts became immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322-323 (1986).

To address all of the elements required by the United States Court of Appeals for the Eleventh Circuit in *Gupta v. Florida Bd. of Regents*, 212 F.3d 571 at 587 (11th Cir. 2000), petitioner Barrios also relied on deposition testimony. For present purposes, all that need be considered on the legal issue raised on appeal is petitioner Barrios' declaration, which declaration was attached to the response of petitioner Barrios to the defendants' motion for a summary judgment.

This change in work assignment was a significant change, among other things, for the reasons that I, Pablo Barrios, now had to rotate shifts, had to work on weekends, had to wear a uniform, and had to patrol in a police car." App. 21-22.

The lower appellate court found those facts legally insufficient. The district court judge opined: " * * * None of these circumstances, however, even when considered collectively, constitute a serious or material change in the terms or conditions of Barrios['] employment. [Citation and parenthetical omitted.] Other than a change in some or even most of Barrios's job duties, a conclusion that does not necessarily follow from Barrios' declaration, there is no evidence that the transfer significantly affected Barrios' rank, compensation or benefits. [Citation and parenthetical omitted.] For example, there is no evidence that the transfer resulted in a demotion or required Barrios to work more hours for the same amount of pay. To the extent that Barrios asserts that his clothing allowance was actually decreased and therefore that the transfer affected his compensation, the record is devoid of any information from which a factfinder could determine the difference in the clothing allowance provided to officers in the investigation unit as opposed to the patrol unit. Consequently, Barrios has failed to demonstrate that any decrease was sufficiently substantial to constitute an adverse employment action. [Citation and parenthetical omitted]. And finally, while Barrios may have preferred to work in plain clothes rather than a uniform, out of an office rather than a patrol car, or with dignitaries rather than "commoners," Barrios has failed to point to any

authority that these inconveniences or blows to the perceived prestige of his assigned duties are sufficient to give rise to a Title VII claim. [Citation and parenthetical omitted.] For these reasons, the undersigned finds that Barrios has failed to demonstrate that he was subject to any adverse employment action in retaliation for protected conduct." App. 13-14.

Following that written opinion, petitioner Barrios filed a motion pursuant to Federal Rule of Civil Procedure 59(e). In that motion, petitioner Barrios sought to alter the trial court's decision by relying on the following non-Eleventh Circuit decisions to establish that Barrios' factual allegations were legally sufficient to satisfy the element of an adverse employment action: *Burlington Indus., Inc. v. Ellerth*, 424 U.S. 742 at 761 (1998) (reassignment with significantly different responsibilities constitutes a tangible employment action); *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 at 691 (1965) (particular hours of day and the particular days of the week that employee must work are subjects well within the realm of "wages, hours and other terms and conditions of employment"); *Hampton v. Borough of Tinton Falls Police Dept.*, 98 F.3d 107 at 116 (3d Cir. 1996); *Mondezelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 at 788 (3d Cir. 1998); *Tarshis v. Riese Org.*, 211 F.3d 30 at 38 (2d Cir. 2000); and *Richardson v. New York State Dept. of Corr. Serv.*, 180 F.3d 426 at 444 (2d Cir. 1999). The trial judge denied that motion in a tersely worded order.

On appeal, petitioner Barrios argued that the trial judge erred in granting the motion for a summary judgment on the basis that petitioner Barrios did not establish

that he suffered an adverse employment action. In addition to distinguishing the Eleventh Circuit's *Davis* opinion, petitioner Barrios relied on the above-cited opinions from outside the Eleventh Circuit.

The lower appellate court issued a simple opinion simultaneously adopting the above-quoted reasoning of the district court and affirming the order granting summary judgment in its entirety. No mention was made of the other non-Eleventh Circuit decisions supporting petitioner Barrios. App. 1.

REASONS FOR GRANTING THE WRIT

Recently, this Court decided *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). That decision involved the retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a). This Court addressed two elements of a retaliation claim, namely what is sufficient to satisfy the requirement of "protected activity" and what is sufficient to establish "a causal connection." However, this Court did not address the concept of an "adverse employment action." In *Breeden*, this Court only mentioned that phrase, when discussing the allegations of the complaint at issue in that case.

Title 28 United States Code section 2000e-2(a), itself, does not use the phrase "adverse employment action." That phrase is apparently treated as a judicial term of art that succinctly summarizes the words that Congress did use, namely "to fail or refuse to hire or discharge any

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."

This phrase was used in a majority opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 507, 521, 523 (1993). However, there was no need to define this concept, because the plaintiff in that case had been denied a promotion and discharged. Consequently, the breadth of that phrase was not addressed. Likewise, this phrase was only used without amplification in *Collins v. City of Harker Heights Texas*, 503 U.S. 115 at 122 (1999) and *Ward Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 at 660 (1989).

Congress, itself, has only used this phrase twice in its legislation. 29 U.S.C. § 2007(a) (Employee Polygraph Protection Act of 1988); 38 U.S.C. § 4311(b).

This phrase first appeared without elaboration in a lower federal appellate court decision in the context of a discrimination claim in *Loeb v. Textron, Inc.*, 600 F.2d 1003 at 1019 n. 25 (1st Cir. 1979). There, the First Circuit addressed a claim under the Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634.

In *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 at 761 (1998) this Court observed that "[t]he concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age and national origin discrimination, as well as sex discrimination. Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in

employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a change of benefits." All of the cursory list of actions contained in *Ellerth* involve monetary loss, with the single exception of the phrase "reassignment with significantly different responsibilities."

This case raises the issue of what non-monetary actions on the part of the employer can satisfy this concept. It is submitted that Congress intended illegal retaliatory action on the part of the employer to be actionable even if the employer does not attack the employee through his pocketbook, but rather retaliates by means of pschological warfare.

The decision below directly conflicts with the decision in *Hampton v. Borough of Tinton Falls Police Dept.*, 98 F.3d 107 at 111, 115-116 (3d Cir. 1996). *Hampton* held that the involuntary transfer of a police officer from the detective bureau to the less desirable road patrol was an adverse employment action, even though neither that officer's rank nor his pay had been decreased.

This lower appellate court ruling likewise appears to conflict with this Court's conclusion under the National Labor Relations Act that "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 at 691 (1965).

Resolution of this Title VII issue will also apply to retaliation claims under other statutes such as 29 U.S.C. § 623(d) (Age Discrimination In Employment Act) and 42 U.S.C. § 12203(a) (Americans With Disabilities Act). Moreover, this issue will also apply to the merits of claims made pursuant to 42 U.S.C. § 2000(e)-2 and other statutory causes of action in which the lower courts have made the phrase "adverse employment action" an element.

This is an issue of national importance that has yet to be addressed by this Court.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Declaration Of Plaintiff Filed As Exhibit To Plaintiff's Response To Defendant's Motion For Summary Judgment.....App. 21

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15322
Non-Argument Calendar

D.C. Docket No. 00-01995-CV-UUB

PABLO BARRIOS,

Plaintiff-Appellant,

versus

FLORIDA BOARD OF REGENTS,
JESSE L. CAMPBELL,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed January 16, 2002)

Before HULL, WILSON and FAY, Circuit Judges.

PER CURIAM:

The judgment entered in favor of the defendants/appellees is affirmed for the reasons set forth in the **ORDER GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT** issued by the district court under date of July 9, 2001.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 00-1995-CIV-UNGARO-BENAGES

PABLO E. BARRIOS,
Plaintiff,

vs.

FLORIDA BOARD OF REGENTS
and JESSE L. CAMPBELL,
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

(Filed Jul. 11, 2001)

THIS CAUSE is before the Court upon Defendants' Motion for final Summary Judgment, filed April 23, 2001.

THE COURT has considered the Motion, the pertinent portions of the record and is otherwise fully advised in the premises. On July 14, 200, Plaintiff Pablo F. Barrios filed the Amended Complaint asserting claims of retaliation under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e-S *et seq.* and the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.10 *et seq.* and national origin discrimination[1] under the FCRA against Defendant Florida Board of Regents (the "Board"). The Amended Complaint also asserts claims against Defendant Jesse L.

[1] The Amended Complaint also asserts a national origin discrimination claim under Title VII against the Board. However, this claim was dismissed as untimely by Order dated October 13, 2000.

Campbell ("Campbell") in his individual capacity, pursuant to 42 U.S.C. § 1983, for violations of the Equal Protection Clause and the First Amendment. The Board and Campbell file the instant Motion seeking summary judgment as to all of the claims. For the reasons discussed below, the Motion is granted in its entirety.

FACTS[2]

Plaintiff Pablo Barrios ("Barrios"), a Cuban American, has been employed with Florida International University ("FIU") in various positions since January 1977. Amended Joint Pretrial Stipulation ("Stipulation") at ¶5A.B. In 1980, Barrios became employed as a police officer with the Department of Public Safety at FIU and was successively promoted to his current position as Lieutenant in 1992. Deposition of Pablo Barrios ("Barrios Depo.") at 16-17. By 1992, Barrios was assigned to the investigations unit. Id. at 19, 20. However, sometime in 1996, Major Vicki Cutcliffe, then acting Director of Public Safety, contacted Barrios and advised him that he was being transferred out of investigations and to the midnight shift. Id. at 21.

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[2] Unless otherwise noted, the facts stated herein are undisputed and viewed in the light most favorable to the Plaintiff. In determining the undisputed, material facts, however, the Court notes that the Plaintiff failed to provide a statement of the material facts as to which he contends there exists a genuine issue to be tried. *See* Local Rule 7.5 (providing that under such circumstances all material facts set forth in the movant's statement will be deemed admitted).

In December 1996, Jesse L. Campbell ("Campbell") assumed the position of the Director of Public Safety at FIU. Declaration of Jesse L. Campbell ("Campbell Decl.") at ¶3. Two months later, in February 1997, Campbell returned Barrios to the investigations unit advising Barrios that he was not happy with the person who was supervising the unit and encouraging Barrios to name the people that he wanted for the unit. Barrios Depo. at 22-23. Sometime later in 1997, the captain in charge of the investigations unit left and Campbell asked Barrios to assume his duties. Id. at 24. Barrios contends that he was not paid for the additional duties but that he assumed them gladly, expecting that this would improve his chances of a formal promotion to the position. Id. at 24; Amended Complaint at ¶17.

In March 1998, the open captain position was posted and Barrios and the other applicants were interviewed by a search and screen committee. Although some concern was expressed over the fact that Barrios did not have the requisite qualifications for the lieutenant position that he was holding or the captain position for which he was applying, the committee decided to interview him. Id. at 20-21.

The applicants' qualifications and performance in various categories were scored by each of the committee members and these scores were totaled. Defendant's Statement of Undisputed Material Facts ("SUF") at ¶¶13-15. Deposition of Edward Harris ("Harris Depo.") at 9. The committee then forwarded, in no particular order, the names of the applicants with the top three scores to Campbell for his consideration: Gerda Holmes,

Jesse Scott ("Scott") and Barrios. Defendant's SUF at ¶16.[3] Campbell promoted Scott to the captain position. Id. at ¶12. Campbell explains that he promoted Scott as opposed to Barrios because he concluded that Scott had a better educational background, had better supervisory skills, and had a stronger history of community contribution. Campbell Decl. at ¶13. Campbell denies that he considered the national origin or any other protected classification of the applicants in making his decision. Id. at ¶¶12, 14-16.

On June 15, 1998,[4] Campbell received a copy of an internal grievance filed by Barrios in which Barrios asserted that Campbell's decision not to promote him was based on his national origin. Barrios contends that on that same day he reported to work and received a postdated letter advising him that a complaint had been made

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[3] Because the committee also was screening for open lieutenant positions and many of the applicants applied for both the captain and lieutenant positions, the committee actually forwarded six names to Chief Campbell. In addition to Gerda Holmes, Scott and Barrios's names, Alphonse Ianniello, Peter Canino, and Stephen Fagan's names were forwarded to Chief Campbell. Harris Depo. at 8, 9, 14. Alphonse Iannicllo and Stephen Fagan were promoted to lieutenant. Id. at 30.

[4] In his declaration, Campbell asserts that he received a copy of the grievance on June 15, 1999. The Court will assume, however, that Campbell's reference to 1999 rather than 1998 was a scrivener's error in light of the fact that Barrios's May 27, 1999 EEOC Charge of Discrimination refers to this grievance and Defendants do not appear to dispute in their memoranda in support of summary judgment that Campbell was aware of the grievance by that date.

against him by Officer Willy Perez, one of his subordinates. Barrios Depo. at 61; Exhibits 1 and 2 to Campbell Decl. Perez complained that Barrios had been harassing employees and using racially derogatory terms when referring to Campbell and other Black FIU employees. Id. About a month later, Barrios was transferred out of the investigations unit to the patrol unit. Declaration of Pablo Barrios ("Barrios Decl.").

In October 1998, after obtaining information regarding the substance of Perez's complaints during a staff inspection, Major Cutcliffe directed Lieutenant Alphonse Ianniello to commence an internal affairs investigation of Perez's complaint. Exhibit 1 to Campbell Decl. Major Cutcliffe advised Lieutenant Ianniello that the investigation was to remain confidential. Id. Lieutenant Ianniello made a finding of "not sustained," *i.e.* the allegations could not be proven or disproven. Deposition of Alphonse Ianniello at 21; Deposition of Michael Wright at 17-18.

On May 27, 1999, approximately a year after learning of Campbell's decision not to promote him to captain and filing a grievance regarding the decision and at least two months after the conclusion of the internal affairs investigation, Barrios filed a Charge of Discrimination with the EEOC alleging that the denial of the promotion was a result of national origin discrimination and that the internal affairs investigation was commenced in retaliation for his grievance.

On January 6, 2000, a second internal affairs investigation was commenced against Barrios based on complaints by Officers Matthew Morris and Angelo Barrios

that Barrios had improperly criticized another officer's handling of a suspect, in violation of a provision of the Public Safety Department's Standard Operating Procedures. Defendant's SUF at ¶¶29-30: Exhibit 5 to Campbell Decl. Major Cutcliffe conducted the investigation of this complaint and made a finding of "not sustained." Exhibit 6 to Campbell Decl. On April 12, 2000, Barrios filed a second EEOC Charge of Discrimination alleging that the second internal affairs investigation was in retaliation for his filing the May 1999 EEOC Charge of Discrimination. Barrios commenced this action one month later.

LEGAL STANDARD

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The *Adickes* Court explained that when assessing whether the movant has met this burden, the court should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *See Adickes*, 398 U.S. at 157; *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997) (citing *Adickes*).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward

with proof of the absence of any genuine issue of material fact, the nonmoving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrell,* 477 U.S. 317 (1986). *Barfield v. Brierlon,* 883 F.2d 923, 933 (11th Cir. 1989).

If the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial. *See Environmental Defense Fund v. Marsh,* 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *See Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.,* 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts then the Court should deny summary judgment. *See Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc.,* 669 F.2d 1026, 1031 (5th Cir. 1982). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) ("[T]he dispute about a material fact is 'genuine,' . . . if the evidence is such that a reasonable jury could return a verdict for the non-moving party.").

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *See Adickes,* 398 U.S. at 160. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the nonmoving party has introduced no evidence whatsoever. *See Brunwick*

Corp. v. Vineberg, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255.

LEGAL ANALYSIS

I. Federal Claims

A. Title VII Retaliation Claim Against the Florida Board of Regents

To establish a prima facie case of retaliation under Title VII, Barrios must establish that: 1) he engaged in protected conduct; 2) he suffered an adverse employment action; and 3) a causal relationship exists between the two events. *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 586 (11th Cir. 2000). The Board argues that it is entitled to summary judgment as to Barrios's retaliation claim because even assuming Barrios engaged in protected conduct, many of the actions identified as adverse are time-barred and are not adverse as a matter of law. The Board also argues that to the extent Barrios has identified sufficiently adverse employment action, he has failed to demonstrate the requisite causal relationship.

As an initial matter, the Board concedes that Barrios's June 15, 1998 grievance regarding Campbell's decision not to promote him to captain is protected conduct. Additionally, the Court is persuaded that Barrios's May 27, 1999 and April 12, 2000 EEOC Charges of Discrimination also constitute protected conduct. The Court agrees with

the Defendants, however, that Barrios has failed to establish that any adverse employment action was taken in retaliation for this conduct.

In reaching this conclusion, the Court notes that Barrios provides little assistance in identifying the employment actions upon which he relies to press his claims. The only employment action that Barrios discusses with any specificity in his opposition memorandum is his July 1998 transfer to the patrol unit. Nonetheless, after a careful review of the record, the Court is persuaded that Barrios variously has asserted the following additional conduct as adverse employment action to which he was subjected as a result of engaging in protected conduct: 1) threats that he would lose the assistance of other officers in completing his investigative work; 2) being called "old" and a "fat ass;" 3) being subjected to inspections of his work; 4) being questioned by Campbell about his grievance; and 5) the two internal affairs investigations. However, none of these actions, viewed individually or collectively, amount to adverse action under Title VII.

As the Eleventh Circuit has explained, an employment action "must impact the 'terms conditions, or privileges' of the plaintiff's job in a real and demonstrable way" to constitute an adverse action. *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1239 (11th Cir. 2001). Moreover, the asserted impact cannot be speculative and must have at least a tangible adverse effect on the plaintiff's employment. *Id.* Thus, to prove an adverse employment action, a plaintiff must show a "serious and material change" in the terms or conditions of employment, and in determining whether such a showing has been made, the court must disregard the plaintiff's subjective view of the

significance and adversity of the action. *Id.* (instructing the trial court to consider whether the action would be materially adverse as viewed by a reasonable person in the circumstances). Applying these standards, only two of the actions discussed above, the two internal affairs investigations and Barrios's transfer to the patrol unit, merit much discussion regarding whether they constitute adverse action. No reasonable person could view threats of being denied assistance with one's workload (apparently never acted upon), being asked about his grievance, being called two names, or an instance of having one's work reviewed as effecting a serious or materially adverse change in the terms or conditions of employment. *Davis,* 245 F.3d at 1238 (noting that not all conduct by an employer negatively affecting an employer constitutes adverse employment action); *Gupta,* 212 F.3d at 587 (recognizing that the limitations on what is adverse conduct are consistent with the basic principle that Title VII is neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace).

With respect to the two internal affairs investigations, as the Board points out, the record is devoid of any evidence that the investigations or the subsequent findings had any impact on Barrios's employment. There is no evidence that the investigations or the "not sustained" findings resulted in any tangible consequence in Barrios's compensation, benefits, rank, or job duties. *See Davis,* 245 F.3d at 1239-41 (finding that two negative job performance memoranda did not constitute adverse employment action as the record failed to demonstrate that the employee suffered any loss of pay, benefits, or promotional opportunities as a result).

As an additional matter, the Court is persuaded that no reasonable factfinder could find a causal relationship between Barrios's protected conduct and the two internal affairs investigations. The law is clear that to establish a causal connection, a plaintiff must demonstrate that the individual responsible for the alleged adverse action was aware of the protected conduct at the time he acted. (*Gupta*, 212 F.3d at 590; *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997). The record is undisputed that Officers Willy Perez, Matthew Morris, and Angelo Barrios lodged the complaints underlying the two internal affairs investigations. Moreover, Lieutenant Janniello and Major Cutcliffe conducted the investigations and made the ultimate findings of "not sustained." There is no evidence that these individuals were aware of Barrios's grievance or Charges of Discrimination and there is no evidence that the only individual specifically identified as being aware of any of the protected conduct[,] Campbell, influenced or otherwise participated in the lodging of the complaints or the consequent investigations.

With respect to Barrios's July 1998 transfer, the Court notes Barrios's declaration in which he asserts that his transfer to the patrol unit was a "significant change" because: 1) he was no longer able to work Monday through Friday, 9a.m. to 5p.m. but instead had to work rotating shifts, which included weekends; 2) he could no longer work in plain clothes but instead had to wear a uniform and work out of a patrol car rather than an office; 3) he was precluded from assignments involving protecting visiting dignitaries and instead had to work with "commoners;" and 4) officers in the investigations

unit received more money for their clothing allowance than those in the patrol unit. *See* Barrios Decl. None of these circumstances, however, even when considered collectively, constitute a serious or material change in the terms or conditions of Barrios['s] employment. *See Davis*, 245 F.3d at 1245 (noting that courts are reluctant to hold that changes in job duties amount to adverse employment action when unaccompanied by any tangible harm).

Other than a change in some or even most of Barrios's job duties, a conclusion that does not necessarily follow from Barrios's declaration, there is no evidence that the transfer significantly affected Barrios's rank, compensation or benefits. *Id.* at 1245 (explaining that in the unusual circumstance job reassignment may be so substantial and material that it does alter the terms, conditions and privileges of employment). For example, there is no evidence that the transfer resulted in a demotion or required Barrios to work more hours for the same amount of pay. To the extent Barrios asserts that his clothing allowance was actually decreased and therefore that the transfer affected his compensation, the record is devoid of any information from which a factfinder could determine the difference in the clothing allowance provided to officers in the investigations unit as opposed to the patrol unit. Consequently, Barrios has failed to demonstrate that any decrease was sufficiently substantial to constitute an adverse employment action. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (requiring at least a threshold level of substantiality for employment action to be cognizable). And finally, while Barrios may have preferred to work in plain clothes rather than a uniform, out of an office rather than a patrol

car, or with dignitaries rather than "commoners," Barrios has failed to point to any authority that these inconveniences or blows to the perceived prestige of his assigned duties are sufficient to give rise to a Title VII claim. *Id.* at 1244 (remarking that any diminution in prestige the plaintiff may have felt as a result of his reassignment was insufficient to allow him to prevail on his Title VII claim). For these reasons, the undersigned finds that Barrios has failed to demonstrate that he was subjected to any adverse employment action in retaliation for protected conduct. Accordingly, the Board is entitled [to] summary judgment on Barrios's Title VII retaliation claim.

B. Section 1983/Equal Protection and First Amendment Claims Against Campbell

Next, Campbell argues that he is entitled to summary judgment on Barrios's claims that he violated his rights under the Equal Protection Clause and the First Amendment because Barrios has failed to establish all of the elements of the claims and because he is entitled to qualified immunity.

1. Section 1983/First Amendment Claim

To prevail on his free speech retaliation claim, Barrios must establish that: 1) his speech implicates a matter of public concern; 2) his First Amendment interests in engaging in the speech outweighed the Defendants' interest in promoting the efficient operation of FIU's Public Safety Department; and 3) his speech played a substantial part in the identified adverse employment action. *See*

Mason v. Village of El Portal, 240 F.3d 1337, 1339 (11th Cir. 2001).

With respect to the first element of the claim, the Court notes that when given an opportunity to identify the circumstances that resulted in a violation of his First Amendment rights, Barrios testified only that he was precluded from speaking to friends "and stuff like that" and speaking negatively about Campbell. *See* Barrios Depo. at 70.[5] However, to demonstrate that one has engaged in speech on a matter of public concern, the speech must relate to a matter of political or social concern to the community. *Maggio v. Sipple*, 211 F.3d 1346, 1351-52 (11th Cir. 2000). At most, Barrios's desire to speak with friends on some unspecified topic or to criticize Campbell were matters of interest purely personal to Barrios.

Nevertheless, the record does contain evidence that Barrios had complained that three Hispanic officers were not being paid adequately for the work they were performing and that Hispanics were not being promoted to the higher ranks. *See* Barrios Depo. at 73; Barrios Decl. However, the record is devoid of any evidence from which a rationale juror could infer that Barrios suffered any adverse employment action, imposed by Campbell or otherwise, in retaliation for these complaints. In this regard, the Court notes that, as with his retaliation claims, Barrios relies only on his transfer to the patrol

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[5] Specifically, Barrios testified that his comment to Officer Perez that "I wouldn't trust my son with Mr. Campbell" was converted by Perez into racially derogatory comments about Campbell. *See* Barrios Depo. at 70.

unit as the adverse employment action suffered as a result of exercising his free speech rights. Even assuming, however, that Barrios relies on this action and the other employment actions considered for purposes of analyzing his Title VII retaliation claim, this claim is similarly defective.

There can be no serious dispute that an *adverse* employment action is an essential prerequisite to a First Amendment retaliation claim. *See, e.g., Merriweather v. Alabama Dept. of Public Safety*, 17 F. Supp. 2d 1260, 1279 (M.D. Ala. 1998) (explaining that a court must determine whether employment decisions rose to the level of adverse employment actions before considering whether the plaintiff's speech played a role in any alleged retaliation). To the extent Campbell participated in any of the employment actions discussed above, *see Broddy v. Florida Dep't of Labor & Employment Sec.*, 133 F.3d 797, 801 (11th Cir. 1998) (stating that a plaintiff must establish that a supervisor personally participated in the constitutional violation underlying the § 1983 claim or a causal connection between the supervisor's actions and the violation), the Court has determined that none of the actions constitute adverse action as a matter of law. *See Merriweather*, 17 F. Supp. 2d at 1279 (finding that plaintiff failed to establish First Amendment retaliation claim where identified employment actions had been found to be insufficient for purposes of plaintiff's Title VII retaliation). Consequently, Barrios has failed to demonstrate that he was retaliated against for exercising his First Amendment rights. Accordingly, Campbell is entitled to summary judgment on this claim.

2. Section 1983/Equal Protection Claim

The Eleventh Circuit has made clear that to prevail on a § 1983 equal protection claim, a plaintiff must establish that the defendant acted with discriminatory intent. *Mencer v. Hammonds*, 134 F.3d 1066, 1070 (11th Cir. 1998); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995). As a related matter, the absence of proof of discriminatory intent supports a defendant's assertion of qualified immunity. *Mencer*, 134 F.3d at 1070 ("[A]n actor cannot know he is violating clearly established equal protection rights unless he harbors discriminatory intent). Consequently, in order to avoid summary judgment on this claim, Barrios must point to evidence in the record from which a reasonable jury could conclude that Campbell intended to discriminate against him. *Id.* Barrios has failed to do so. In fact, Barrios has failed to address this claim in his opposition memorandum in any respect.

In any event, the Court notes that the undisputed record evidence is that Campbell did not base his decision on the national origin of any of the three applicants who were recommended to him by the search and screen committee. *See* Campbell Decl. at ¶¶ 12, 14-16. Rather, Campbell asserts without contradiction, that he promoted Scott instead of Barrios because Scott had a better educational background, better supervisory skills, and a stronger record of contribution to the community. *See Id.* at ¶ 13. Barrios has failed to point to any evidence to undermine the bases for Campbell's decision. Moreover, the unchallenged deposition testimony of Edward Harris ("Harris"), a member of the search and screen committee, supports Campbell's assertion that Scott was more qualified.

Harris confirmed that the applicants' educational background, community service, and quality of interview were among the criteria considered in determining the appropriate applicant for the captain position. *See* Deposition of Edward Harris ("Harris Depo.") at 10. Moreover, Harris explained that although the committee ultimately decided to interview everyone who applied, including Barrios, Barrios had neither the requisite qualifications for the position he was holding nor the position for which he was applying. *See* Id. at 20-21. Rather, the strength of Barrios's scores with respect to quality of interview was the reason that Barrios ranked among the top scoring applicants and, consequently, that his name was forwarded to Campbell. No reasonable factfinder could conclude, after considering Campbell's decision in this context that Campbell decided to promote Scott instead of Barrios based on Scott's and Barrios's national origin rather than their relative qualifications. Thus, the Court finds that Campbell also is entitled to summary judgment on Barrios's § 1983/equal protection claim.

II. State Law Claims: FCRA National Origin Discrimination and Retaliation Claims Against the Board

Lastly, the Board argues that with respect to the FCRA national origin discrimination claim, it is entitled to summary judgment because the claim is time-barred and, with respect to both the FCRA discrimination and retaliation claims, it is entitled to summary judgment because the claims are barred by the Eleventh Amendment. Alternatively, the Board contends that should these

arguments fail, the Court should decline to exercise supplemental jurisdiction of these claims. Barrios fails to offer any argument in opposition. Nevertheless, the undersigned will not reach the Board's arguments regarding the timeliness of the discrimination claim or the propriety of exercising supplemental jurisdiction because she is persuaded that the Eleventh Amendment bars these claims against the Board, an arm of the State of Florida. *See Biggs v. State of Florida Bd. of Regents*, 1998 WL 344349, *1 (N.D. Fla. June 11, 1998) (concluding that the Florida Board of Regents is a state entity).

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or Citizens or Subjects of an Foreign State. The United States Supreme Court and the Eleventh Circuit have held that a state will be deemed to have waived its Eleventh Amendment immunity from suit only where stated by the most express language or by such overwhelming implication that there is no room for any other reasonable interpretation. *E.g., Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990); *Lapides v. Board of Regents of the Univ. Sys. of Georgia*, 251 F.3d 1372, 1373 (11th Cir. 2001). After careful consideration of the language of the FCRA, the Court is unpersuaded that the Act provides, expressly or by implication, that the State of Florida has waived its immunity and consented to suit in federal court on claims brought under the Act. *See Biggs*, 1998 WL 344349 at *1-*2 (holding that the Eleventh Amendment bars FCRA claims against state agencies because the Florida Legislature has not waived immunity

and consented to be sued in federal court); *Williams v. State of Florida*, 2000 WL 799729, *2-*3 (N.D. Fla. June 10, 2000) (concluding that Eleventh Amendment immunity applies to claims under the FCRA against the State of Florida); *Haynes v. State of Florida*, 1998 WL 271462, *5 (S.D. Fla. Jan. 26, 1998) (granting summary judgment on plaintiff's FCRA claims against the Florida Dep't of Insurance based on the Eleventh Amendment); *Yeary v. State of Florida*, 1997 WL 284648, *2 (M.D. Fla. May 13, 1997) (granting summary judgment on plaintiff's FCRA claims against the Florida Dep't of Corrections based on the Eleventh Amendment). Accordingly, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Final Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of July, 2001.

/s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT
JUDGE

copies provided:
counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case Number: 0-1995-CIV-UNGARO-BENAGES

PABLO BARRIOS,

Plaintiff,

vs.

FLORIDA BOARD OF REGENTS, et al.,

Defendants.

_____/

DECLARATION OF PABLO BARRIOS

I, PABLO BARRIOS, declare and state:

I, Pablo Barrios, was in the investigations unit of the F.I.U. Police Department for more than ten years. That unit worked most of the time from 9:00 a.m. to 5:00 p.m. Persons in that unit had Saturdays and Sundays off, unless a special investigation was being conducted. Officers who work in the investigations unit work out of an office, rather than a car, and wear plain clothes. Officers in the investigations unit get more money for their clothing allowance. Officers who work in the investigations unit work have as part of their job responsibility working, for example, to protect visiting dignitaries. Patrol officers deal with commoners. While in the investigations unit, I, Pablo Barrios, always had good evaluations for this work performance. After I, Pablo Barrios, obtained a grievance form in May of 1998, Ed Harris, a fellow employee of the F.I.U. Police Department, informed me that I would be transferred to the patrol unit, because I was pursuing a grievance against Director

Campbell. I, Pablo Barrios, was told by Harris that Campbell was the source of this statement. I, Pablo Barrios, was transferred to the patrol unit in July of 1998 within one month after having formally filed a grievance against Director Campbell for failure to promote him as a result of discrimination based on national origin. Before this transfer, Director Campbell knew that I had filed this grievance. This change in work assignment was a significant change, among other things, for the reason that I, Pablo Barrios, now had to rotate shifts, had to work on weekends, had to wear a uniform, and had to patrol in a police car.

One time after I filed my grievance, Captain Wright of the F.I.U. Police Department told me that Director Campbell told Wright that Campbell was giving Wright a bad evaluation because Wright filed a grievance against Campbell like I had done.

Prior to the opening of a Captain's position at the F.I.U. Police Department, I, Pablo Barrios, often complained to Director Campbell and Captain Cutliffe that Hispanics were not being fairly compensated for their work and were not being promoted to the higher ranks of the F.I.U. Police Department. In part based on these statements, as well as statements contained in the grievance, Director Campbell transferred me from the investigation unit to the patrol division as already stated above.

Pursuant to Title 28 United States Code section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Signed on May 18, 2001 in Miami-Dade County, Florida.

/s/ Pablo E. Barrios
PABLO BARRIOS